PUBLIC PROSECUTOR

v.

TAN CHOON ANG

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[CRIMINAL REVISION NO. KG. 2 OF 1988]
2 NOVEMBER 1989

CRIMINAL PROCEDURE: *Murder - Preliminary inquiry - Section 302 of the Penal Code - Power of the Magistrate to amend charge to s. 304 of the Penal Code - Transfer of case to the Sessions Court.*

The accused, Tan Choon Ang @ Tan Choon Yeong was charged for the murder of one Lam Po Oi under s. 302 of the Penal Code.

At the end of the preliminary inquiry conducted by the Magistrate, she amended the charge to one under s. 304 of the Penal Code. She also directed the accused to be tried before the Sessions Court pursuant to s. 140(i)(b) of the Criminal Procedure Code (CPC), and made the order of transfer of the case accordingly.

The DPP Encik Abdul Rahman *vide* a letter dated 29 December 1988 urged the High Court to exercise its revisionary powers to set aside the order made by the Magistrate on the ground that she had erred in law in not committing the accused to the High Court as there are sufficient grounds to commit the accused for an offence under s. 302 and to direct her accordingly.

Held:

[1] The relevant powers of a Magistrate in a preliminary inquiry for this revision are found in ss. 140 and 141 of the Criminal Procedure Code.

[2] Section 141 imposes on a Magistrate the duty to consider whether there is sufficient evidence adduced by the prosecution to commit the accused for trial in the High Court under s. 143(b) or take action against him under s. 140(i)(b) of the Criminal Procedure Code.

[3] The term sufficient evidence is defined as credible evidence and thus, the phrase "*prima facie* case" is confusing and misleading when referred to the role of a Magistrate in a preliminary inquiry.

[4] As a preliminary inquiry is not a trial (see *Re Low Kuan Meng* [1962] MLJ 265) it is not the duty of the Magistrate to be satisfied that the prosecution has to establish a *prima facie* case or it be proved beyond reasonable doubt - that is the function of a trial Court. Nor is the Magistrate expected to assess the credibility of the witnesses or to contemplate the accused's possible defence.

[5] Section 139(i) of the Criminal Procedure Code allows the Magistrate to look at the cautioned statement made by the accused to see whether there is credible evidence against him.

[6] Section 140(i)(b) of the Criminal Procedure Code when read with s. 177 allows the Magistrate in a preliminary inquiry, where the evidence discloses an offence triable by a Sessions Court to frame a charge for that offence and transfer the case to be tried by a President of the Sessions Court.

[7] The Magistrate had rightly invoked her power under s. 140(i)(b) and I accordingly affirm her said order and would direct the accused to appear before the Sessions Court.

[Order accordingly.]

Cases referred to:
In re Pang Poh Pah [1985] 2 MLJ 214
PP v. Ng Goh Weng & Anor. [1979] 1 MLJ 128
Re Low Kuan Meng [1962] MLJ 265
Re Osman bin Abdullah [1954] MLJ 239

Legislation referred to:
Criminal Procedure Code, ss. 139(i), 140(i), (a), (b), 141(i)
Penal Code, s. 302

For the complainant - Nik Suhaimi, DPP
For the accused - Anthony Tai; M/s. Anthony Tai

JUDGMENT

Haidar Mohd. Noor J:

The accused, Tan Choon Ang alias Tan Choon Yeong was charged in the Magistrate's Court for an offence under s. 302 of the Penal Code for the murder of one Lam Po Oi (f) on 4 May 1987 at about 6.25 p.m., at the Anglican Cementary, 13 km. Batu Kitang Road, Kuching.

At the end of the preliminary inquiry the learned Magistrate amended the said charge to one under s. 304 of the Penal Code and directed that the accused be tried before the Sessions Court and made the order of transfer of the case accordingly.

Encik Abdul Rahman, the Deputy Public Prosecutor *vide* letter dated 29 December 1988 urged the Court to exercise its revisionary powers to set aside the order made by the learned Magistrate on the ground that she had erred in law in not committing the accused to the High Court as there are sufficient grounds to commit the accused for an offence under s. 302 and to direct her accordingly. In view of the application of the Deputy Public Prosecutor I agreed to call for the record of the proceedings so as to satisfy myself of the legality or otherwise of her order.

On 4 September 1989 I heard the arguments of the Deputy Public Prosecutor and the defence Counsel wherein I reserved my judgment. I now proceed to give my judgment.

The relevant powers of a Magistrate in a preliminary inquiry are spelt out in Chapter XVII of the Criminal Procedure Code (CPC), the relevant provisions for the purpose of this revision are ss. 140 and 141. Section 140(i) reads:

> 140(i) When the evidence referred to in the last preceding section has been taken *the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him, unless it appears to the Magistrate that such person should be tried before himself or before some other Magistrate* in which case he shall either:
>
> (a) forthwith frame a charge in writing and call upon the accused to plead thereto; or
>
> (b) *order the accused to be tried before some other Magistrate.*
>
> (Emphasis added)

Section 141(i) reads:

> 141(i) If after taking the evidence for the prosecution the Magistrate is of opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence or offences the accused is charged.

The Legislature, in my view, by the use of the phrase "sufficient grounds" would seem to imply that the duty imposed on a Magistrate in a preliminary inquiry is to consider whether there is sufficient evidence adduced by the prosecution to commit the accused for trial in

the High Court under s. 143(b) or take action in accordance with s. 140(i)(a) or (b) of the Criminal Procedure Code as may be applicable. By sufficient evidence, would in my view, mean that the evidence must necessarily be credible evidence. Therefore, with respect, the use of such phrase as "*prima facie* case" may tend to be a bit confusing and misleading as the role of a Magistrate in a preliminary inquiry is only inquisitorial as is borne out by s. 139(i) of the Criminal Procedure Code which reads:

> 139(i) When the accused person is brought before him the Magistrate shall proceed to hear the case for prosecution and **to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.**
> (Emphasis added)

As a preliminary inquiry is not a trial (see *Re Low Kuan Meng* [1962] MLJ 265) it is not the duty of the Magistrate to be satisfied that the prosecution has to establish a *prima facie* case or it be proved beyond reasonable doubt - that is the function of a trial Court of appropriate jurisdiction. Neither is he expected to assess the credibility of the witnesses or to contemplate the accused's possible defence. In *re Pang Poh Pah* [1985] 2 MLJ 214, Wan Yahya J, *inter alia,* said:

> ... Once the bare ingredients of any offence triable by the Court of a Judge has been presented to him, his duty is to make the order of committal and not usurp the more intricate duty of assessing the credibility of facts from the body so authorised to perform that function, i.e., the jury.

Accordingly to Bellamy J in *re Osman bin Abdullah* [1954] MLJ at p. 239:

> It is no part of the inquiring Magistrate's duty to consider possible lines of defence to the charge which the accused may raise in the course of the inquiry or to decide whether there are sufficient grounds for convicting the accused.

The issue here is - has the prosecution adduced credible evidence for the Magistrate to invoke s. 143(b) of the Criminal Procedure Code i.e., to commit the accused for trial before the High Court as the prosecution is urging the Court to do in this case or was the Magistrate right in exercising her powers under s. 140(i)(b) of the Criminal Procedure Code?

It is then appropriate for me to examine the record of the proceedings of the preliminary inquiry in order to satisfy myself that the Magistrate had made the right order, having regard to the law and the authorities before disturbing her order under my revisionary powers.

Apart from the cautioned statement of the accused (P10), the evidence that connects the accused to the deceased is that the accused befriended the deceased and there is no evidence even to show that the accused was last seen with the deceased **immediately** before the death. In respect of the cautioned statement, the defence Counsel after consulting the accused, placed on record of his objection of the admissibility of the cautioned statement and setting out the grounds thereof and decided to reserve the trial within trial of the admissibility of his cautioned statement for the High Court to determine. According to Suffian LP (as he then was) in *PP v. Ng Goh Weng & Anor.* [1979] 1 MLJ at p. 128, it is indeed the duty of the Magistrate in law to decide on the admissibility of the cautioned statement subject to what they had to say. The stand taken by the accused in respect of his cautioned statement has placed the position of his cautioned statement in a tricky situation. Is the Magistrate entitled to look at the cautioned statement presented by the prosecution as part of the evidence in view of the stand taken by the defence or to leave it to the High Court? As the defence did not, at the stage of the preliminary inquiry, seriously challenge the admissibility of the cautioned statement by having a trial, in my view, the Magistrate can look at the

evidence of the cautioned statement to see whether there is credible evidence against the accused by virtue of s. 139(i) of the Criminal Procedure Code, that is, "to take all such evidence as may be produced in support thereof and **such other evidence as the Magistrate may think fit to call for"**. (Emphasis added)

In fact in his submission, the defence Counsel touched on the contents of the cautioned statement to the effect that it did not disclose the ingredients of the offence with which the accused is charged.

In the cautioned statement the accused said that there was a quarrel between him and the deceased and bricks were thrown and eventually the deceased fell on the bricks and sustained serious injuries on the head and became motionless. He panicked and seeing a few gunny sacks there decided to wrap the deceased's body and placed it down at one end of the bridge. The medical evidence did not show how those injuries could have been sustained by the deceased other than the cause of death. If the medical evidence had shown that such injuries could not have been sustained as described by the accused, then it is not the function of the learned Magistrate then to evaluate which evidence to accept or reject but to leave such doubt for the trial Court having jurisdiction to resolve. I regret to say that the preliminary inquiry was very badly conducted by the prosecution. It is the duty of the prosecution, in my view, to assist the Magistrate by presenting credible evidence so as to constitute sufficient grounds for the accused to be committed for the offence of murder, as in this case, to the High Court. On the evidence presented by the prosecution before her I am of the opinion that she was right to rule that there is insufficient evidence to constitute the ingredients of the charge under s. 302, an offence triable by the High Court.

What then is the next option open to her? She decided to invoke her powers under s. 140(i)(b) of the Criminal Procedure Code by preferring a charge under s. 304 of the Penal Code and had it transferred to the Sessions Court, the Court having jurisdiction of such offence. However, s. 140(i)(b) of Criminal Procedure Code reads:

> ... order the accused to be tried before some other Magistrate.

Section 140(i)(b) of Criminal Procedure Code was extensively and carefully considered by Wan Yahya J, in the case of *In re Pang Poh Pah*, where his Lordship held that the learned Magistrate may, when the preliminary inquiry evidence discloses an offence triable by a Session Court, frame a charge for that offence and, in accordance with s. 140(i)(b) read with s. 177 of the Criminal Procedure Code, transfer the case to be tried by a President of the Sessions Court, giving an extended meaning to the word "Magistrate" to include "President" (or now "Judge"). I am in full agreement with the interpretation of s. 140(i)(b) of the Criminal Procedure Code by my learned brother.

In the circumstances I am of the opinion that the learned Magistrate had rightly invoked her powers under s. 140(i)(b) in view of the evidence presented by the prosecution in the preliminary inquiry though perhaps it would appear that she had erred in her reasons for making such an order. From a perusal of the record of the preliminary inquiry I am satisfied that there are no valid grounds for me to disturb her order and accordingly I affirm her said order and would direct the accused to appear before the Sessions Court, Kuching on 13 November 1989 to be dealt with according to law. His bail is extended to 13 November 1989.

Also found at [1990] 1 CLJ 550